UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of: **NORTHWEST AIRLINES, INC.**	FAA Order No. 98-22 Served: November 10, 1998 Docket No. CP96GL0237

DECISION AND ORDER[1] [2]

Respondent Northwest Airlines, Inc. ("Northwest") has appealed from the written initial decision of Administrative Law Judge Burton S. Kolko issued on July 2, 1997. The law judge assessed a $40,000 civil penalty for violations occurring at three security screening checkpoints at Detroit Metropolitan Wayne County Airport on December 26-28, 1994.[3] Northwest has appealed, arguing that the civil penalty is excessive.

Complainant alleged in the complaint:

---

[1] The unredacted decision contains sensitive security information (SSI) and must be maintained in a confidential manner to prevent compromising civil aviation security. 14 C.F.R. Part 191. The unredacted decision may not be disclosed except in accordance with 14 C.F.R. § 191.5. Anyone who violates this provision is subject to a civil penalty and other enforcement or corrective action by the FAA. 14 C.F.R. § 191.5(d). Copies of this decision in which the SSI has been redacted are publicly available. This is a redacted version.

[2] The Administrator's civil penalty decisions are available on LEXIS, WestLaw, and other computer databases, and are available on CD-ROM through Aeroflight Publications. They can be found in Hawkins's Civil Penalty Cases Digest Service and Clark Boardman Callaghan's Federal Aviation Decisions. For additional information, *see* 63 Fed. Reg. 37,914, 37,929 (July 14, 1998).

[3] Judge Kolko ordered that Northwest pay a total of $56,000 in three separate civil penalty actions: $40,000 in Docket No. CP96GL0237; $1,000 in Docket No. CP96GL0246; and $15,500 in Docket No. CP96GL0251. A copy of the law judge's written initial decision is attached. Northwest has appealed only from the initial decision in Docket No. CP96GL0237.

Count I

3. On or about December 26, 27, 28, 1994, between approximately 6:30 a.m. and 2:00 p.m., Northwest, acting through its agent International Total [Services],[4] operated the *** Security Screening Checkpoint, an entrance to a sterile area of Detroit Metropolitan Wayne County Airport, Michigan (DTW).

4. During the period described in paragraph 3, ITS had assigned Mr. Abdo Mozip the position of Checkpoint Security Supervisor (CSS).

5. During the period described above, Mr. Mozip was not qualified to be assigned as a CSS.

6. By virtue of the circumstances described in paragraphs 2, 3, and 4[5] above, Northwest failed to carry out Sections II.B.1 and XIII.D of the approved Northwest Air Carrier Standard Security Program [ACSSP].

Count II

1. On or about December 28, 1994, at approximately 8:00 a.m., Northwest, acting through its agent ITS, operated the *** Security Screening Checkpoint, an entrance to a sterile area of DTW.

2. At the time described in paragraph 1, ITS did not have an agent working in the capacity of a CSS at that checkpoint.

3. By virtue of the circumstances described in paragraphs 1 and 2 above, Northwest failed to carry out Section II.B of the approved Northwest Air Carrier Standard Security Program [ACSSP].

Count III

1. On or about December 28, 1994, at approximately 8:00 a.m., Northwest, acting through its agent ITS, operated the *** Security Screening Checkpoint, an entrance to a sterile area of DTW.

2. At the time described in paragraph 1, ITS allowed the assigned CSS (Agent Gordon) to depart from her primary assigned duties as CSS in order to conduct

---

[4] The law judge wrote in his initial decision that Complainant mistakenly referred to the contract security company as International Total Securities, when the correct name is International Total Services. *See* Initial Decision at 2, n.1.

[5] This was clearly a typographical error, and should have read, "3, 4, and 5 ...."

non-screening duties, effectively leaving other security screeners at that checkpoint without supervision.

3. At the same time and the same checkpoint described in paragraphs 1 and 2, ITS had assigned an employee to conduct screening duties when that employee (Agent Baron) had last received recurrent training for those duties in May 1994.

4. By virtue of the circumstances described in paragraphs 1, 2, and 3 above, Northwest failed to carry out Sections II.E and XIII.C of the approved Northwest Air Carrier Standard Security Program [ACSSP].

Count IV

By reason of the foregoing facts and circumstances as stated in Counts I, II, and III above, Respondent, violated Sections 108.5[6] and 108.9(c)[7] of the Federal Aviation Regulations.

1. Pursuant to Title 49 of the United States Code, Section 46301 (49 U.S.C. § 46301), Respondent is subject to a civil penalty not to exceed $10,000.00 for each violation alleged.

2. Under the facts and circumstances of this case, a civil penalty of $40,000 is appropriate.

---

[6] Section 108.5(a)(1) of the Federal Aviation Regulations provides as follows:

> Each certificate holder shall adopt and carry out a security program that meets the requirements of § 108.7 for each of the following scheduled or public charter passenger operations:
>
> > (1) Each operation with an airplane having a passenger seating configuration of more than 60 seats.

14 C.F.R. § 108.5(a)(1).

[7] Section 108.9(c) of the Federal Aviation Regulations provides as follows:

> Except as provided by its approved security program, each certificate holder required to conduct screening under a security program shall use the procedures included, and the facilities and equipment described, in its approved security program for detecting explosives, incendiaries, and deadly or dangerous weapons to inspect each person entering a sterile area at each preboarding screening checkpoint in the United States for which it is responsible, and to inspect all accessible property under that person's control.

14 C.F.R. § 108.9(c).

> WHEREFORE, the Agency, by counsel, respectfully requests that the Administrative Law Judge enter an order that Respondent be assessed a civil penalty in the amount of $40,000.

Complaint dated September 24, 1996.

Northwest admitted the allegations contained in Counts 1-3 of the complaint, but denied the remainder of the complaint. Answer dated October 22, 1996. Northwest set forth several affirmative defenses, including the claims that the $40,000 civil penalty sought by Complainant was arbitrary, capricious, and unlawful, and that the prosecution of this matter would have no deterrent effect and was not in the public interest. *Id.*

Subsequently, counsel for Northwest submitted a letter to Judge Kolko, which read, in pertinent part as follows:

> Subject to the Court's approval, the parties have agreed to resolve Case No. 95-GL-72-0046/CP96GL0237 as follows: The facts alleged in the Agency's Complaint will be deemed admitted by Northwest. The parties will submit written briefs on the issue of the appropriate sanction, if any.

(Letter by Stanley S. Sandiford, Corporate Counsel, to the Hon. Burton S. Kolko, dated March 21, 1997.)[8]

The parties later submitted their briefs regarding the issue of sanction. In support of its position that a $40,000 civil penalty, as sought in the complaint, was appropriate, Complainant attached the following exhibits to its brief:

1. Section II.B.1.a of the ACSSP;

2. Section XIII.D.2 of the ACSSP;

3. Order Assessing Civil Penalty, dated April 1, 1997, assessing a $6,000 civil penalty against Northwest, for a violation of 14 C.F.R. § 108.5(a)(1) involving the *** security screening checkpoint at DTW on December 20, 1993;

[8] Consequently, the law judge issued an order canceling the hearing and setting a date for the submission of briefs.

4. A portion of Appendix 4, the Sanction Guidance Table, from FAA Order No. 2150.3A, Compliance and Enforcement Program;

5. Section II.E.1 of the ACSSP;

6. Order Assessing Civil Penalty, dated April 1, 1997, assessing a $4,000 civil penalty against Northwest, for a violation of 14 C.F.R. § 108.5(a)(1) involving the *** security screening checkpoint at DTW on March 3, 1994; and

7. Section XIII.C.3 of the ACSSP.

In its "Petition for Civil Penalty Reduction," Northwest argued that the civil penalty should be reduced to $6,000. Northwest did not attach any exhibits to support the arguments made in its Petition for Civil Penalty Reduction.

In his written initial decision issued on July 2, 1997, the law judge assessed a $40,000 civil penalty against Northwest as follows:

- $18,000 for the violations on December 26-28, 1994, as described in Count I;
- $7,500 for the violation on December 28, 1994, as described in Count II;
- $7,500 for the violation on December 28, 1994, as described in paragraphs 1 and 2 of Count III; and
- $7,000 for the violation on December 28, 1994, described in paragraphs 3 and 4 of Count III.

Initial Decision at 1-4.

Regarding Count I, the law judge ruled that a $6,000 civil penalty for each of the three days that Mr. Mozip served as the checkpoint security supervisor (CSS) when he was not qualified to serve in that position was commensurate with the nature of the violation. Initial Decision at 2. The law judge wrote that because Northwest permitted an untrained person to serve as the CSS, "[s]ecurity at the airport was materially compromised[.]" *Id.* The law judge referred to the Sanction Guidance Table, which calls

for a moderate range sanction -- $4,000 to $7,499 -- against air carriers for training violations and a maximum range sanction -- $7,500 to $10,000 -- for failures to comply with an air carrier's security program. The law judge ruled that:

> [T]hese violations are more fairly characterized as training violations, which happen also to transgress the carrier's ACSSP. Against this background, I conclude that a total penalty of $18,000 is a fair and reasonable one in that it will appropriately further the agency's penalty goals of compliance and deterrence.

Initial Decision at 2. The law judge found Northwest's arguments that there were mitigating factors[9] to be unavailing. *Id.*

Regarding the violation of Count II, involving Northwest's failure to have an agent at a particular checkpoint performing the CSS functions, the law judge assessed a $7,500 civil penalty as sought by Complainant. The law judge explained that a $7,500 civil penalty is an appropriate civil penalty because Northwest had failed to comply with its ACSSP. Initial Decision at 3. By not having an employee performing the CSS duties at that checkpoint, "the goals of the [security] program were not met and security was compromised." *Id.*

The law judge assessed a $7,500 civil penalty for the first violation included in Count III involving a CSS who left his assigned duties to cover non-screening responsibilities, thereby leaving the screeners at the checkpoint without supervision. The law judge noted that this was a violation of the ACSSP and that Northwest previously had been assessed a civil penalty for a similar violation. Initial Decision at 3. Finally, the law judge assessed a $7,000 civil penalty against Northwest for the second violation

---

[9] Northwest had argued that the screener had been removed immediately from the CSS position as soon as ITS was made aware of the situation. Also, Northwest had claimed that ITS had tightened its procedures to prevent another unqualified person from serving as CSS. Initial Decision at 2.

in Count III, involving a screener who was past due for recurrent training. The law judge noted "[s]creeners constitute the first line of security in air transportation, and adequate training is essential if they are properly to perform their duties." Initial Decision at 4.

Northwest argues that the penalty assessed by the law judge is contrary to applicable law, precedent, and public policy. According to Northwest, the goal of the civil penalty program is "to drive compliance with FAA regulation by imposing a financial deterrent on noncompliants." Appeal Brief at 2. Northwest argues that it cannot be considered as a "noncompliant." *Id.* Also, argues Northwest, the law judge failed to consider mitigating factors justifying a reduction in civil penalty. *Id.*, at 3.

Preliminarily, to the extent that Northwest is arguing that a civil penalty action is inappropriate and that agency policy calls for an administrative action at most, it should be noted that such an issue does not belong in this forum. The question to be addressed in these proceedings is whether the alleged violation or violations occurred, and if so, what the appropriate civil penalty is. In the Matter of American Airlines, FAA Order No. 89-6 at 7-8 (December 21, 1989). "The question in these proceedings is not whether an administrative action would have been a better choice by the FAA." *Id.*, at 8. [10]

Furthermore, Northwest has misconstrued the FAA enforcement policy statements that it quoted in its appeal brief. Northwest quotes a portion from FAA Order No. 2150A, which states as follows:

---

[10] Similarly, in In the Matter of Wyatt, FAA Order No. 92-73 (December 21, 1992), the Administrator rejected the argument that Complainant had violated agency policy, as set forth in FAA Order No. 2150.3A, when it commenced a civil penalty action rather than attempting to counsel or educate the respondent to bring about voluntary compliance. The Administrator explained that the relevant question was whether the respondent had violated the alleged regulations, which he had.

> g. Fairness. To be effective, the agency's compliance and enforcement program must be fair and reasonable in fact, and should be perceived as fair by those subject to regulation. This does not and should not imply an unwillingness to apply the full force of statutory sanctions where warranted. It does encompass the right of an alleged violator to be given objective, evenhanded consideration of all circumstances surrounding the allegations before final action is taken. It also requires good faith efforts to understand the alleged violator's position and take it into account, as well as to apprise the alleged violator of the agency's position in a timely manner.

FAA Order No. 2150.3A, Compliance and Enforcement Program, § 202(g) (Chg. 18, April 20, 1994).[11] This paragraph makes it clear that in some circumstances, "the full force of statutory sanctions" would be appropriate. In other words, while civil penalties and other legal enforcement action are not always necessary, there are violations that do warrant such legal enforcement action.[12] Due to the number and gravity of the violations involved in this matter, a significant civil penalty is appropriate. The agency enforcement policy set forth in the Sanction Guidance Table, FAA Order No. 2150.3A, Appendix 4,[13] recommends civil penalty ranges for violations such as those involved in

---

[11] This paragraph was formerly found in Section 201(e) of the FAA Order No. 2150.3A (December 14, 1998.)

[12] Northwest also cites to Section 201(c) of FAA Order No. 2150.3A. This section was no longer in effect at the time of this incident. *See* FAA Order No. 2150.3A, Chapter 2 (Chg. 18, April 20, 1994). Former Section 201(c), as quoted in Northwest's brief, provided that formal enforcement action should only be taken when efforts for bringing about voluntary compliance had failed. Appeal Brief at 3. What should be noted is that even if this paragraph still had been in effect, it would not call for different action in this case because voluntary compliance had not been achieved. There were several violations of the regulations caused by failures of Northwest, through its contractor, International Total Services, to comply with the security measures and procedures required under Northwest's ACSSP.

[13] "Order [No.] 2150.3A was 'prepared to provide compliance and enforcement program and procedural guidance for all agency personnel.' [Order No.] 2150.3A at page i. .... The Enforcement Sanction Guidance Table is an appendix to FAA Order [No.] 2150.3A, which was signed by the Administrator of the Federal Aviation Administration. It represents the policy of the agency." In the Matter of Northwest Airlines, FAA Order No. 90-37 at 8-9 (November 7, 1989).

this case. The law judge referred to the appropriate sections of the Sanction Guidance Table in his initial decision when setting the sanction.

Northwest argues that civil penalty action is inappropriate because it is a compliant airline. This seems somewhat incongruous because Northwest does not deny these violations and does not deny that it was issued Orders Assessing Civil Penalty on April 1, 1997, for similar previous violations that occurred at two of the three checkpoints involved in this case. Moreover, "[g]enerally speaking, a violation-free history should be the norm for air carriers, and therefore, should not be regarded, by itself, as a basis for reducing an otherwise reasonable civil penalty." In the Matter of Delta Air Lines, FAA Order No. 92-5 at 6 (February 6, 1992).

Northwest is correct in arguing that in setting a civil penalty, the law judge should take evidence of valid mitigating factors into account. However, in this case, with its very limited record, Northwest has failed to prove any mitigating factors.

"The Administrator has indicated that a civil penalty may be reduced on the basis of corrective action, but only where there is sufficient, specific evidence of swift or comprehensive action that is positive in nature, such as sending employees to special training or instituting programs to ensure compliance with the safety regulations." In the Matter of Detroit-Metropolitan County Airport, FAA Order No. 97-23 at 5 (June 5, 1997). However, "[w]hile it may be appropriate in certain instances to consider corrective action in determining what, if any, civil penalty is appropriate for a discrepancy ..., it clearly does not follow that the performance of corrective action exonerates the violator in every case." In the Matter of Airport Operator, FAA Order

No. 91-41 at 6 (October 31, 1991), *quoting* In the Matter of [Airport Operator], FAA Order No. 91-18 at 7 (June 3, 1991).

In this case, because neither party submitted supporting affidavits, declarations or, any other evidence concerning the circumstances, along with the briefs on the issue of sanction, there was no proof of any mitigating circumstances warranting a reduction in the penalty. Both parties refer in their briefs to events, statements and circumstances but fail to provide citations to documents or page numbers. Unsubstantiated and unsupported factual allegations by attorneys in briefs do not constitute evidence. Hence, the only factual information for consideration on appeal is that set forth in the Complaint, Counts I - III, as admitted in the Answer, and the pertinent portions of the ACSSP. Consequently, Northwest has failed to provide substantial evidence to prove that there were any mitigating circumstances.[14] As long as the law judge properly applied the guidance in the Sanction Guidance Table based upon the facts alleged in Counts I - III – which he did – then there was no error regarding the penalty.[15]

Even assuming that Northwest had built a sufficient record of its corrective actions, those alleged corrective actions did not warrant a reduction of the reasonable civil penalty imposed by the law judge. Regarding the incident involving Mr. Mozip set

---

[14] Complainant did file prehearing submissions. The law judge did not indicate in his decision whether he had considered the prehearing submissions. The prehearing submissions, while in the docket, do not constitute evidence in this matter. *See* In the Matter of Horizon Air Industries, FAA Order No. 96-24 at 5-6 (August 13, 1996), in which the Administrator held that "it was improper for the law judge to consider the unauthenticated exhibits attached to Complainant's Preliminary Witness and Exhibit List in ruling on Complainant's motion for decision."

[15] Indeed, if the law judge did not follow the agency's sanction guidance policy, the law judge's decision would be subject to reversal or modification on appeal. In the Matter of Northwest Airlines, FAA Order No. 90-37 at 8-10 (November 7, 1990).

forth in Count I, Northwest maintains that the ITS Duty Manager is now required to carry a list of CSS-qualified personnel to use as a checklist when inspecting each checkpoint. That does sound like a good idea; however, there is no evidence that had such a system been in place in December 1994 that it would have prevented this incident. There is no evidence that the duty manager inspected on those 3 days at all, let alone, that the duty manager inspected the checkpoint and noticed Mr. Mozip acting as the CSS but was unaware that Mr. Mozip was not qualified as a CSS. There also is no evidence as to how promptly after the incident this measure was introduced. Regarding Count I, Northwest also states ITS immediately removed Mr. Mozip from service. As held in In the Matter of Mauna Kea Helicopters:

> For purposes of reducing the civil penalty, the Administrator has required corrective action to be positive in nature – e.g., sending employees to special training, or instituting programs to ensure compliance with the safety regulations. A decision to terminate an employee does not represent the type of positive corrective action that warrants reduction of a reasonable civil penalty.

In the Matter of Mauna Kea Helicopters, FAA Order No. 97-16 at 10 (May 23, 1997).

As for Northwest's claim that the penalty should be lower because Mr. Mozip intentionally and fraudulently took over the position as the CSS, this argument is not compelling. Even if Northwest had proven these assertions – which it did not – these arguments would be unavailing because Northwest is ultimately responsible for the actions of its contract employees. Even if Mr. Mozip misrepresented his qualifications, ITS must have had a record of his training and testing, and armed with this information, Northwest, through ITS, should have supervised the checkpoints sufficiently to prevent an unqualified person from serving in the CSS position.[16]

---

[16] In In the Matter of [Air Carrier], FAA Order No. 96-19 (June 4, 1996), the carrier argued that the individual security screener employed by the contract security company should bear some

Regarding Count II, Northwest argues that while there was no one acting in the CSS capacity at the checkpoint, there was a qualified CSS at the checkpoint. According to Northwest, the CSS was processing passengers at the magnetometer, rather than serving as the CSS at that checkpoint. Appeal Brief at 7. Once again, there is nothing in the record to prove this assertion; the complaint states merely that the contractor did not have an agent working in the capacity of a CSS at the checkpoint. Complaint, Count II. Moreover,* * *

If the CSS was busy screening passengers at the metal detector, the CSS could not be performing his or her supervisory duties. Hence, even if Northwest had proven that the CSS was present at the checkpoint but was engaged with screening duties at the metal detector, this circumstance would not constitute a mitigating factor. Finally, assuming that there was a staff shortage which led the CSS to take on the magnetometer duties, there is no evidence that Northwest or ITS has adequately addressed such staffing shortages.

Northwest admitted that ITS allowed the assigned CSS to depart from her primary assigned duties as the CSS to conduct non-screening duties as alleged in Count III, ¶ 1-2. Northwest argues on appeal that regardless, staffing levels at the checkpoint were in accordance with the ACSSP. Also, argues Northwest in support of a reduction of the civil penalty, all of the CSS personnel were retrained in their assigned responsibilities. Appeal Brief at 7. However, as the law judge found, these are not mitigating factors. The record contains no information pertaining to the staffing levels at that checkpoint or

---

responsibility for the violation. The Administrator held that "... the air carrier remains responsible for the quality of security screening provided by its contractors, and it is up to the carrier to ensure the high quality of its screeners and security training programs." *Id.*, at 10.

regarding the date or nature of the training. Moreover, even if such supporting evidence were introduced, these arguments would be rejected as mitigating factors for the following reasons. Northwest has not explained how the retraining of the CSSs would prevent such violations in the future. The Administrator has held in the past that simply reminding employees of existing responsibilities and procedures does not constitute the type of corrective action that warrants a reduction in an otherwise reasonable civil penalty. *See e.g.,* In the Matter of Mauna Kea Helicopters, FAA Order No. 97-16 at 9 (May 23, 1997); In the Matter of [Air Carrier], FAA Order No. 96-19 at 12 (June 4, 1996). Finally, even if the checkpoint had the correct number of personnel at the time, there still was not a CSS performing supervisory duties. Hence, no reason has been presented warranting a reduction in the civil penalty.

Regarding the last violation set forth in paragraphs 3 and 4 of Count III,[17] Northwest argues that its contractor has taken steps that should be regarded as mitigating factors. Northwest argues:

> Specifically, a local procedure was instituted whereby the Duty Managers were to pull two (2) files per day for auditing purposes to insure that all employees receive recurrent training. The General Manager would then pull five (5) files every Thursday to follow-up on the work done by the Duty Managers. Further, the new procedure required employees to be retrained every six (6) months, instead of * * * as required by the FAA.

---

[17] Paragraphs 3 and 4 of Count III are somewhat problematic. It was alleged in paragraph 3 that the particular security screener had last received recurrent training for his duties in May 1994. * * *

Hence, on the face of the complaint, Complainant has not stated a violation. Nonetheless, Northwest admitted all the factual allegations in Count III. Also, in its appeal brief, Northwest does not challenge the finding of a violation regarding these events. Consequently, rather than rule that Complainant failed to state a violation in these paragraphs of the complaint, it will be assumed that there was a typographical mistake, and that this screener's last recurrent training occurred in a year prior to 1994.

Appeal Brief at 8. The Administrator does look favorably at the provision of additional training and the development of adequate procedures to ensure that all staff members are up to date on training. Under certain circumstances, not present here, increased training and new procedures may constitute mitigating circumstances. However, in this case, Northwest's and ITS's efforts do not warrant a reduction in the civil penalty. Once again, there is no supportive evidence to substantiate Northwest's assertions. The method outlined by Northwest in its brief for auditing the training files seems rather haphazard. Also, there is no evidence of how quickly these new procedures were instituted or how successful they have been.

Northwest also argues:

> Staffing at DTW has been notoriously difficult. It is difficult for any airline or security company to recruit reliable screening and management personnel at DTW particularly due to the lack of public transportation to the airport. ITS and Northwest, however, instituted a plan for more effective recruitment. Local ITS management began to hire outside of the normal areas of recruitment and began to access different market areas. The ALJ failed to make a good faith effort to understand Northwest's unique position, particularly at this airport, contrary to FAA Order 2150.3A § 201(e)(Dec. 14, 1988).

Appeal Brief at 8. Northwest has not proven that it is in a unique position at this airport, or that the new recruitment practices are effective. Likewise, Northwest failed to establish a relationship between its alleged difficulty in retaining employees with its failure to see to it that the particular screener mentioned in paragraph 3 of Count III was current on his recurrent training requirements.

The $40,000 civil penalty assessed in this case is consistent with agency policy and commensurate to the security violations at the heart of this action. At three security checkpoints, security measures were below the standard required by Northwest's ACSSP due to lack of supervision or lack of qualified supervisors or lack of currently trained

screeners. The types of violations involved in this case are serious and warrant the significant civil penalty assessed in this matter.

THEREFORE, Northwest's appeal is denied. Northwest is assessed a $40,000 civil penalty for the violations involved in this matter.[18]

JANE F. GARVEY, ADMINISTRATOR
Federal Aviation Administration

Issued this 8th day of October, 1998.

18 Unless Respondent files a petition for review with a Court of Appeals of the United States within 60 days of service of this decision (under 49 U.S.C. § 46110), this decision shall be considered an order assessing civil penalty. *See* 14 C.F.R. §§ 13.16(b)(4) and 13.233(j)(2).